BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GUADALUPE MARTINEZ	)	
Claimant	)	
	)	
VS.	)	
	)	
COOPER SERVICE CO.	)	
Uninsured Respondent	)	Docket No. 1,013,691
	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requested review of the December 14, 2005 Award by Special Administrative Law Judge Vincent Bogart. The Board heard oral argument on March 28, 2006.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for the claimant. Albert Cooper, respondent's owner, appeared for the uninsured respondent. Andrew E. Busch of Wichita, Kansas, appeared for the Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board the parties stipulated they were provided written notice and confirmation that Mr. Bogart had been appointed a Special Administrative Law Judge and assigned this case for the purpose of issuing an award. A copy of the Director's Order Appointing Special Administrative Law Judge was faxed to the Board for inclusion in the administrative file as a part of the record.

ISSUES

The Special Administrative Law Judge (SALJ) awarded claimant compensation for a 15 percent whole person functional impairment. The SALJ further determined claimant failed to make a good faith effort to find employment and failed to meet his burden of proof to establish a work disability.

The claimant requests review of nature and extent of disability. Claimant argues he is permanently and totally disabled based on Dr. Murati's opinion. In the alternative, he argues that he met his burden of proof to establish a work disability.

Conversely, the Fund argues that claimant received minimal treatment and Dr. Mills' opinions regarding claimant's functional impairment as well as his task loss are more persuasive and should be adopted. The Fund further argues claimant retains the ability to engage in substantial gainful employment and because he has not demonstrated a good faith effort to find employment a wage should be imputed to him.

Respondent argues that Dr. Murati is not persuasive and claimant retains the ability to engage in substantial gainful employment. Respondent further argues claimant is not credible regarding his current medical condition as well as his ability to perform work.

The sole issue raised for Board review is the nature and extent of claimant's disability, specifically whether he is entitled to an award of permanent total disability or a work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent and worked on oil rigs. On August 4, 2003, he injured his back while lifting pipe. The next day claimant was unable to work and his employer referred him to a chiropractor, Dr. Brad J. Swanson. The respondent paid for two weeks of treatment and temporary total disability compensation and then refused to provide any further medical or disability compensation. Albert Cooper, respondent's owner, testified he did not have workers compensation insurance coverage on the date of the accident.

Dr. Swanson first treated claimant on August 11, 2003, for lower back complaints as well as leg complaints. Claimant provided a history that he had injured his back while lifting a pipe at work. Dr. Swanson diagnosed claimant with lumbar sprain/strain. The doctor treated claimant with manipulations, ice and electrical stimulation. Claimant was provided this same treatment on an almost daily basis through September 2003. In October claimant's treatment was on an almost every other day basis. Because of the slow improvement and duration of pain Dr. Swanson altered his diagnosis on November 5, 2003, to a disk bulge. In February the appointments were scheduled on a weekly basis. Dr. Swanson provided his last treatment to claimant on March 19, 2004, at which time the claimant began treatment with Dr. Murati. Dr. Swanson did not find myofascial pain in claimant's right shoulder girdle nor right trochanteric bursitis.

When respondent failed to appear at a scheduled preliminary hearing on December 9, 2003, the ALJ designated Dr. Pedro A. Murati as the authorized treating physician. The doctor first examined claimant on April 8, 2004. The doctor diagnosed claimant with low back pain with probable radiculopathy, myofascial pain syndrome of the right shoulder girdle, neck and cervical strain and occasional tingling and numbness with both wrists. The next day the doctor performed a nerve conduction study of the upper and lower extremities. The doctor stated the results were consistent with bilateral carpal tunnel syndrome, bilateral Guyon's canal entrapments, left ulnar cubital syndrome, right L5-S1 radiculopathy and neuropraxic right C6-7 radiculopathy. A diagnostic ENG also indicated a right L5-S1 radiculopathy and a neuropraxic right C6-7 radiculopathy.

Claimant was sent for lumbar epidural injections which provided some relief but after the third epidural injection claimant noted an increase in pain. An MRI study revealed a lateral disk bulge at C5-6 and a bulge at L4-5. A CT myelogram also indicated a minimal disk bulge at C5-6. At the July 15, 2004 appointment, Dr. Murati concluded claimant was not a candidate for surgery and further determined claimant was essentially at maximum medical improvement. Claimant was referred for a functional capacity evaluation in order to determine appropriate permanent restrictions. Dr. Murati concluded the claimant was not a candidate for surgery because all he had was a bulge in both the low back and neck without nerve impingement.

The functional capacity evaluation report indicated claimant gave consistent effort in 5 out of 7 static strength tests. And that claimant was inconsistent with static pushing and pulling tests. Dr. Murati concluded that it was not a perfect effort by claimant but the test was valid. Accordingly, Dr. Murati adopted the recommended restrictions limiting claimant to occasional bending, stooping, trunk rotation, squatting, kneeling, climbing stairs, climbing ladders and standing and walking. It was further recommended claimant be limited to occasional reaching above his shoulder, fine hand manipulation and forceful grasping with his right upper extremity with a frequent limitation performing the same activities with his left upper extremity. Dr. Murati adopted the FCE and additionally imposed restrictions against squatting and that claimant should rarely bend, crouch and stoop. No lifting greater than 10 pounds occasionally and 5 pounds frequently with no lifting below knuckle height.

According to the AMA *Guides*[1], the doctor opined claimant has a 15 percent whole person functional impairment. Utilizing the task list compiled by Jon Rosell, the doctor opined that claimant could no longer perform any of the 14 tasks from his 15 year pre-injury occupations. Finally, the doctor opined the claimant was essentially and realistically unemployable.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

At the Fund's attorney's request, Dr. Philip R. Mills examined the claimant on May 4, 2005. Dr. Mills opined that based upon DRE Lumbosacral Category II claimant suffered a 5 percent whole person functional impairment. The doctor noted that the difference between category II and category III is that the latter category requires nerve root compromise. Dr. Mills felt the EMG study was compatible with a diabetic polyneuropathy. Dr. Mills felt the claimant's leg pain was caused by diabetic polyneuropathy. And based upon claimant's history of injury the doctor did not feel the claimant's cervical complaints were related to his accident. The doctor recommended claimant lift only with good body mechanics and avoid lifting greater than 35 pounds. He should use assistance with bulky objects and change positions on an as needed basis. Dr. Mills further opined that claimant's functional capacity evaluation was self limited and not useful for determining restrictions. Utilizing the task list compiled by Steve Benjamin, Dr. Mills opined claimant could no longer perform 7 of 24 tasks for a 29 percent task loss.

At the Fund's request, Steve Benjamin a vocational rehabilitation consultant, met with the claimant and developed a list of job tasks the claimant had performed in the 15 years before his accidental injury. Mr. Benjamin compiled a list of 24 non-duplicative tasks. He further opined that using either Dr. Murati's or Dr. Mills's restrictions the claimant was employable performing unskilled labor earning between $240 and $320 per week. The type of jobs would include electrical bench assembler, hand packager, hand presser and sewing machine operator.

At claimant's attorney's request, Jon E. Rosell, Ph.D., a disability consultant vocational expert, met with claimant on January 26, 2005 and developed a list of job tasks the claimant had performed in the 15 years before his accidental injury. Dr. Rosell compiled a list of 14 tasks. Dr. Rosell noted in his report that, based upon Dr. Murati's restrictions as well as the FCE restrictions, he did not think claimant could return to the employment market without additional education, training or job site accommodations.

Calvin L. Segura Gordon testified that he bought a truck from claimant in January 2004 and when he went to pick it up, it wasn't running and claimant helped push it through mud to the driveway. Mr. Gordon noted that claimant never complained of back pain during the hour it took to push the truck from the backyard to the driveway.

Frank Segura went with his son to get a pick up truck he bought from claimant. The claimant helped push the pick up which was not running. They pushed it back and forth for about 50 feet. It took about 15 minutes. Claimant never complained of back pain as he helped push the pickup truck. Mr. Segura further testified that he has seen claimant working in his garden planting, raking and pulling weeds. He also helped claimant work on lawnmower motors. Finally, it was Mr. Segura's uncontradicted testimony that the claimant tried to talk Mr. Segura out of testifying and indicated that if he got some money from his workers compensation claim he would give some money to Mr. Segura if he did not testify.

The determination of claimant's permanent disability is dependent upon which medical expert's opinion regarding restrictions is more persuasive. And that analysis relies in part upon the credibility of claimant. The uncontradicted testimony of Mr. Gordon and especially Mr. Segura indicate that claimant is capable of more physical activity than he demonstrated to the physicians or at the functional capacity evaluation. And this supports Dr. Mills' opinion that claimant's self limiting efforts at the functional capacity evaluation rendered the restrictions from that evaluation useless. Claimant's complaints and treatment were directed toward his back and legs and it was not until Dr. Murati was authorized to treat that claimant was diagnosed with significant additional upper extremity conditions. Moreover, claimant received minimal treatment from Dr. Murati and that treatment was primarily directed toward his back.

Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[2] Furthermore, the finder of fact is free to consider all the evidence and decide for itself the percentage of disability.[3]

As previously noted, Dr. Mills opined that based upon DRE Lumbosacral Category II claimant suffered a 5 percent whole person functional impairment. The doctor noted that the difference between category II and category III, utilized by Dr. Murati, is that the latter category requires nerve root compromise. Dr. Murati agreed claimant had no nerve root compromise. Finally, claimant agreed that during treatment his personal physician had diagnosed him with diabetes and Dr. Mills opined that condition was responsible for the claimant's leg pain. The Board finds, in this case, Dr. Mills' testimony is more persuasive and adopts his opinion that as a result of his work-related low back injury the claimant suffered a 5 percent whole person functional impairment.

It should be noted that Mr. Frank Segura's testimony raised serious questions regarding claimant's testimony but the medical evidence is undisputed that claimant's work-related accident, at a minimum, resulted in permanent impairment and restrictions for a low back injury.

Claimant argues that he suffers a permanent total disability as a result of his work-related injury. The claimant's medical and vocational experts support his contention. Not surprisingly, the Fund's medical and vocational experts conclude claimant retains the ability to engage in substantial gainful employment. Because claimant did not provide a full and consistent effort on his functional capacity evaluation and because of Mr. Segura's testimony detailing claimant engaged in physical activities greater than exhibited at the evaluation the Board again finds Dr. Mills as well as Mr. Benjamin more persuasive and concludes claimant retains the ability to engage in substantial gainful employment.

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[2] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant has sustained a low back injury. Consequently, claimant's permanent disability compensation is governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[4] and *Copeland*[5]. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that the post-injury wage should be based upon the worker's retained ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Id.* at 320.

And the Kansas Court of Appeals in *Watson*[7] held that failing to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[8]

The Board concludes, as did the SALJ, that claimant has failed to prove that he made a good faith effort to find appropriate employment after recovering from his low back injury. In short, claimant retains the ability to work but did not seek any employment. Consequently, a post-injury wage should be imputed.

Mr. Benjamin's opinion regarding claimant's retained ability to earn wages is the only opinion in the record. The Board is persuaded that claimant is able to earn $320 per week. Comparing $320 per week to claimant's pre-injury wage of $368 per week yields a 13 percent wage loss.

The other prong of the permanent partial general disability formula is the loss of work tasks. As indicated above, Dr. Mills reviewed Mr. Benjamin's list and determined claimant had a 29 percent task loss. The Board is mindful that Dr. Murati opined claimant had a 100 percent task loss but that was based upon restrictions to not only claimant's low back but also his upper extremities and cervical spine. As claimant's injuries from his work-related accident were limited to his low back the Board is not persuaded by Dr. Murati's opinion. Moreover, Dr. Murati relied upon the FCE in determining his restrictions and, as noted by Dr. Mills, claimant self-limited his efforts at that evaluation. Consequently, the Board concludes that claimant sustained a 29 percent task loss due to his work-related injury.

Averaging the 29 percent task loss with the 13 percent wage loss yields a 21 percent work disability. The Board finds claimant's whole person functional impairment is 5 percent, based upon Dr. Mills' rating. Consequently, claimant is entitled to receive benefits for a 21 percent permanent partial general disability under K.S.A. 44-510e.

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[7] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[8] *Id.* at Syl. ¶ 4.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Special Administrative Law Judge Vincent Bogart dated December 14, 2005, is modified to find claimant suffered a 5 percent whole person functional impairment and is entitled to compensation for a 21 percent work disability.

An award of compensation is hereby made in favor of claimant, Guadalupe Martinez, against the Workers Compensation Fund.[9] The claimant is entitled to 63.43 weeks of temporary total disability compensation at the rate of $245.35 per week or $15,562.55 followed by 76.98 weeks of permanent partial disability compensation at the rate of $245.35 per week or $18,887.04 for a 21 percent work disability, making a total award of $34,449.59, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 28th day of April 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Albert Cooper, Respondent, 3610 Constant Rd., PO Box 381, Winfield, KS 67156
Andrew E. Busch, Attorney for Fund
Vincent Bogart, Special Administrative Law Judge
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] The ALJ determined respondent was financially unable to pay compensation and assessed liability against the Fund in an Order dated July 23, 2004.